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Separation of Powers beyond the State: The 'inconveniences of [a]bsolute power'¹

Aoife O'Donoghue

1. Introduction

The character of the separation of powers is such that, as with its sistren, the rule of law and democratic legitimacy, it ~~often gets bandied~~ ~~is often invoked about~~ without much clear elucidation as to the author's intent, its content, its rationale or the consequences of its ~~invocation~~ ~~evocation~~. Focusing on constituted power and the covetous character of authority it is unsurprising that those wielding ~~such clout power~~ are, ~~in reality~~, slow to fully inculcate the separation of powers ~~into~~ their practice ~~of authority~~. Certainly within global governance there is a reluctance to admit that constituted power ought both to be divided and checked. Of late, despite some assertions as to the state's imminent demise both normative and institutional claims for the separation of powers are proposed. These claims most frequently emerge amongst EU scholars but with rising regularity such perspectives gain traction amongst researchers ~~seeking to suggest~~ ~~claiming~~ there is some life to the doctrine as a prime organisational tool in both normative and institutional global governance.² This chapter in looking beyond the state examines a space where covetousness of constituted power reaches its zenith, but also where power and particularly its legitimate exercise has started to be debated.

Whilst Waldron argues that in comparison to other normative claims there is a dearth in the overall analysis of the separation of powers a better description may be the lack of comparative attention paid to other state-based separation of powers models and the normative claims that may be made from such an analysis.³ For example, in incidences such as the United Kingdom with its parliamentary sovereignty and long-developing constitutional order, much energy is expended upon worrying about the existence and necessity of the separation of powers but rarely with a regard to other models.⁴ This form of debate is often replicated in other jurisdictions with the majority of comparative claims limit themselves to identifying a legislature, executive and judiciary and otherwise arguing they are sui generis in their operative separation of powers.⁵ As such, questioning the separation of powers tends to focus on defining it and proving that the exceptions either prove it exists or ~~means makes~~ it is meaningless beyond the supremacy of one branch within a particular state or ~~within~~ the broader 'family of states' within which its ~~form~~ resides. Debates as to the separation of powers outliving its usefulness question ~~s~~ its existence as an ongoing concern in a metaphysical manner that shares camaraderie in many ~~some~~ European states as well as the US but perhaps in doing so these academics protest too much in talking about something they claim is ~~now~~ filled with irrelevance.⁶

Recent attempts by both Möllers and Waldron to remedy the scarcity of comparative and normative debate are most welcome as both aim at the substance of the claims put forth ~~both~~

¹ J. Locke, *Two Treatises of Government*. Cambridge Cambridge University Press 2005, p. 338.

² B. Fassbender, 'The United Nations Charter as Constitution of The International Community', *Columbia Journal of Transnational Law* 1998, vol. 36, no. 3, p. 529-619; B. Fassbender, *U.N. Security Council Reform and the Right of Veto: A Constitutional Perspective*, The Hague: Kluwer Law International 1998; C. Walter, 'Constitutionalizing (Inter)national Governance - Possibilities for and Limits to the Development of an International Constitutional Law', *German Yearbook of International Law* 2001, vol. 44, no. 1, p. 170-201.

³ J. Waldron, 'Separation of Powers in Thought and Practice', *Boston College Law Review*, 2014, vol. 54, no. 2, p. 433-468, at 433-435.

⁴ R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, Cambridge: Cambridge University Press 2010, p. 214; V. Bogdanor, *The New British Constitution*, Oxford: Hart Publishing 2009.

⁵ Waldron, *Separation of Powers in Thought and Practice*, p. 433; C. Möllers, *The Three Branches: A Comparative Model of the Separation of Powers*, Oxford: Oxford University Press 2013.

⁶ E. A. Posner & A. Vermeule, *The Executive Unbound: After the Madisonian Republic*, Oxford: Oxford University Press 2010, p. 208 or Martin Loughlin, *The Idea of Public Law*, Oxford: Oxford University Press 2003.

within states but also ask broader questions on how the separation of power regulates authority.⁷ Yet, both authors also present and are bound by the common facility to make tremendous, if rigorous, claims since as Waldron correctly states, there has been little beyond tautology in many of the oft trotted bastions of separation of powers. Montesquieu, Locke, Hobbes and the Federalist Papers, alongside other classical texts, form the often uncontested basis of deliberation especially when such ~~invocations-evocations~~ move directly to a domestic analysis of the author's own jurisdictional and governance claims.⁸ Obviously the rule of law, democratic legitimacy and human rights have their own bellwethers nevertheless each contains enough foundational content for academics to knowingly choose their starting point without all commencing from ~~unchanged-uunchallenged~~ touchstones. Of course, this chapter ~~has just continued-continues~~ this very practice. This observation is not necessarily to negatively critique such action, but rather to point to the narrowness of discussions which commence with these luminaries and then pick their angle, be it the executive, judiciary or legislature followed by the initiation of a claim of supremacy for that power. The intermediate step, of examining what the separation of powers can bring to governance, a step which will be attempted here, is oft missing.

2. Separation of Powers beyond the State

This article draws a distinction between global governance, public international law, global law and global public law. While global governance envelops the political and philosophical, global public law forms part of this and serves it while also being a distinguishable element of its operation. The interaction between global governance and global public law also concerns the identification of constituent power holders. Community or society is often the basis on which constituent power has been identified and outside of the governance/law paradigm the broader political arena characterised as the *polis* or *civitas* has limitations on its internal membership. Constituted power is the 'legal basis on which authority is exercised within a legal framework, whereas constituent power is the exercise of political power and the ultimate source of legitimate authority.'⁹ Yet, the global or international community envelopes almost every juridical unit into its scope, leaving an unresolved tension that assumes a lack of an 'other'. While there is potential in regarding community, or preferentially, constituency, as a method by which we may identify the constituted power holders until this discussion has been fully considered there will remain a difficulty with separation of powers beyond the state.¹⁰ This tension makes identifying constituent actors difficult and is left unaddressed here but cannot be ignored in the broader debate on global authority.¹¹

While it is global governance as opposed to constitutionalisation which is at issue here governance entails the use of constituted power. As such, identifying potential constituted power holders from within global governance becomes a necessity. This process of identification aids in understanding one aim of employing separation of powers beyond the state ~~that of as~~ identifying who wields power and, as such, what may be divided and checked beyond a passing reference to states or tyrannical power. Constituted power is not only linked to the separation of powers, but also democratic legitimacy and the rule of law. Thus, in identifying an order where constituted power is legitimately exercised within a system of governmental authority and

⁷ J. Waldron, 'Separation of Powers in Thought and Practice', *Boston College Law Review*, 2014, vol. 54, no. 2, p. 433-468; Möllers, *The Three Branches* 2013.

⁸ J. Montesquieu, *The Spirit of the Laws*, ed. & trans. A.M. Cohler, B.C. Miller & H.S. Stone, New York: Cambridge University Press 1989, p. 157; J. Locke, *Two Treatises of Government*, Cambridge: Cambridge University Press 1988; T. Hobbes, *Leviathan*, ed. R. Tuck, Cambridge: Cambridge University Press 1996, p. 127-128; A. Hamilton, J. Madison, J. Jay, C. Rossiter, C. R. Kesle, *The Federalist & Anti Federalist Papers*; Waldron, 'Separation of Powers in Thought and Practice', p. 433.

⁹ A. O'Donoghue, *Constitutionalism in the Global Constitutionalisation Debate*, Cambridge: Cambridge University Press 2014, p. 54.

¹⁰ O'Donoghue, *Constitutionalism in the Global Constitutionalisation Debate*, p. 236.

¹¹ M. Loughlin, *The Idea of Public Law*, Oxford: Oxford University Press 2003, p. 35.

utilising normative claims as part of its legitimacy requires that constituent actors also be ascertained. This does not necessarily require a constitutional structure, but once governance occurs and from the lawyer's perspective once a law is created, administered and adjudicated questions of legitimate governance are raised and thus we must ask who is it that is governing.

Of course, there is a short hand answer that states are the constituted power holders, they are internally legitimate and thus they legitimately create law beyond the state. Yet, as ~~we have~~ already mentioned there is a disjuncture between the constituent power holders who choose the constituted power holders within their state and their interests and the global interests for which public international law and global public law operate in response to. Indeed, as Goldsmith and Posner have both argued for a state to take ~~into account~~ account of global interests over its domestic interests ~~into account~~ would be undemocratic.¹² Undemocratic as the constituent actor chooses their constituted power holders to act in their interest not the interests of the world. This is also, of course, assuming we are talking about states who are all ~~themselves~~ internally legitimate.

This departure from the purely inter-state focus closely relates to the debates on the objects and subjects of international law as well as the nascent concept of global law and global legal pluralism.¹³ The multitude of bodies such as NGOS or corporations engaged in administration of post-conflict territories, the role of diasporas in influencing the development of law, the emergent legislative role of the Security Council or the IMF when its loans are accepted, the direct role of the Security Council in the lives of individuals through its Terrorist Committee and the small pool of largely private actors engaged in judicial enterprise ought to fill those concerned with legitimate governance with unease.¹⁴ Some may proffer that states make the law and thus whilst it is imperfect governance is not as seriously compromised as what may be imagined. Yet, the public element of international law correctly infers the use of constituted power and as McDonald and McDonald state there is a disjuncture between the content of state and global interests.¹⁵ Relying on the notion of representative states and their internal separation of powers does not satisfy the exercise of constituted power beyond the state. This leaves us with ~~difficulties in the legitimate exercise of public constituted power and a whole set of difficulties with its legitimate exercise~~. Of course it could immediately be claimed that as a constitutional construct it is nonsense to reach for the separation of powers in the context of global public law. The arguments put forward by Walker regarding pluralist constitutionalism, the relative short history of the nation state as well as the ever-present existence of constituted power as long as organised groups have placed power in a sub-group of society, means that how we go about dividing and checking such authority is relevant beyond the constitutional nation state.¹⁶ As a basic claim this piece hopes to categorise the unease as to the wielding of constituted power through the separation of powers and to stress the need to regard it as global public law even if a global constitutionalisation process remains all but perceptible.

¹² J. L. Goldsmith & E. A. Posner, *The Limits of International Law*, Oxford: Oxford University Press 2005, p. 200.

¹³ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford: Oxford University Press 2010; N. Walker, 'The Idea of Constitutional Pluralism', *Modern Law Review* 2002, vol. 65, no. 3, p. 317.

¹⁴ S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-building*, Oxford: Oxford University Press 2005; D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Journal of International Criminal Justice* 2009/7, Issue 2, p. 333; M. Darrow *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, Oxford: Hart Publishing 2003.

¹⁵ T. Macdonald & K. Macdonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry', *The European Journal of International Law* 2006, vol. 17, no. 1, p. 89-119, at 89.

¹⁶ N. Walker, 'The Idea of Constitutional Pluralism', *The Modern Law Review* 2002, vol. 65, no. 3, p. 317-359; N. Walker, 'Taking Constitutionalism beyond the State', *Political Studies* 2008, vol. 56, no. 3, p. 519-543.

Global public law presently stands in a perfect position to commence a separation of powers analysis. The global governance order is moving beyond its horizontal roots and starting to form an intricate governmental order that prompts an array of questions on how to go about settling power beyond the state. Global public law includes public international law, but also questions surrounding global administrative law, regional law, such as the EU or the Arctic, as well as the interactions of states but remains separate from the notion of global governance. This articulation deliberately utilises Loughlin's argument in *The Idea of Public Law* that public law is an autonomous discipline with a distinctive character.¹⁷ While Loughlin was not counting the global variant in his account arguably the point still stands that once we examine the tasks of public law and its role with regard to governmental authority its place as a discipline emerges. Further, his argument that often we look for public law (in his case British public law which with its long winding evolution is reminiscent of global public law) in all the wrong places which means that the 'shadowy' practices of government remain hidden is all too prescient in law beyond the state.¹⁸ Global administrative law, global constitutionalisation, global legal pluralism amongst others, all grapple with the questions associated with 'shadowy' governmental authority. Further, concentrating on the 'public' element of international law attempts to liberate this discussion from the 'constitutional question' beyond the state. Not employing 'international' also moves the discussion away from the inter-state consent based demesne of what ought to still to be considered public international law.

3. Separation of Powers and Gaps in Global Governance

Whilst possibly wanting in ambition Vile's 'pure theory' puts forth a simplicity to the separation of powers that ~~while, as has been others have commented commented,~~ does not actually exist, suggests something of its character.

A pure doctrine of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these branches there is a corresponding feature of government, legislative, executive or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the other functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check on the others and no single group will be able to control the machinery of State.¹⁹

Standing alongside Waldron's conception this usefully demonstrates the domestic understanding of the operation of separation of powers. There are several points that are important in Vile's description; the maintenance of liberty, three branches with attached governance attributes that are cut off from one another including in their membership and the provision of checks. Each of these is considered here, but critically it is important to note that there is no ideal or pure system where the separation of powers fully operates.

Recognising the separation of powers as possessing a complicated character whilst also adopting a conception that inculcates checks and balances and division moves us away from the absolutes of deference to the exception and an idealisation of a particular form opening up the possibility of debating separation of power outside of a fastidious structure. Yet, having made this claim this is not to establish a *tabula rasa* beyond the state. A differentiated view can only go so far and that is probably best evidenced within global public law. Thus, it is possible to start from a position where the descriptive element of absoluteness of division and checks possesses a minimum quality, but retains manoeuvrability to the extent that it does not cause unfairness or injustice.

¹⁷ Martin Loughlin, *The Idea of Public Law*, Oxford: Oxford University Press 2003, p. 1

¹⁸ Loughlin, *The Idea of Public Law*.

¹⁹ M. J. C. Vile, *Constitutionalism and the Separation of Powers*, Oxford: Oxford University Press 1967, p. 18.

This article adopts Waldron's differentiated separation of powers; that is the division of power alongside checks and balances as ~~the-its~~ *de minimus* and uses these benchmarks to consider the possibility of their existence within global public law.²⁰ Further, it considers what the gaps created by ~~any-of~~ their absences tells us about the integrity and dignity of the creation, administration and enforcement of law beyond the state. In addition to Waldron's differentiated model this article proffers a further explication by borrowing Kirgis' description of customary international law on a sliding scale.²¹ Kirgis suggests that while customary international law is made up of two elements, *opinio juris* and state practice, at times there is 'more' *opinio juris* than state practice and on other occasions 'more' state practice than *opinio juris*. Critically, however, both must be present for customary international law to exist nonetheless they do not have the same exact quantity at each iteration of its creation. To repeat this within the separation of powers; checks and balances and divisions of power must both be present within governance, but the amount of each to validate the presence of the separation of powers can and does vary between systems. Both elements must be operational, but the amount of each can vary and at times will but the concrete presence of one will compensate for a lower degree of the other. This aids in explaining the presence of separation of powers in a multitude of orders when no model is identical to another. Vitally both elements must be present at a minimum level of operation, but their form can vary. Thus this chapter utilises a differentiated separation of power model within global governance, as such, division of power in combination with checks and balances must be present, but with an understanding that the degree of the differentiated elements present can fluctuate in operation and in combination they fulfil the separation of powers' aim of integrity and dignity in the law.

Taking Waldron's approach or alternatively a stoic idealisation of the single actor holding multiple roles partially elucidates the fluid character of the separation of powers.²² Constituted power holders may co-exercise power at each focal point of adjudication, law-creation and administration in a partial and temporally limited manner while retaining their distinctive role illustrates how adjudication, law-creation and administration can be fulfilled by the same actors. Thus, we may regard the overlaps of function with a little less fear than the Vile's pure theory allows. For example, commentators may come to grips with the US Vice-President sitting in Congress, the French Constitutional Court or the historic position of the Lord Chancellor in the UK, which prior to reform was continually part of all three branches, with more understanding if it is recognised that constituted power holders do not sit in isolation from each other and can, from the necessity of governance, overlap for brief moments. Albeit the role of the UK's Lord Chancellor as continuous involved in all three branches was, as its reform suggested, beyond the pale.²³ In not regarding these examples as standing in isolation or as discrete anomalies, but rather recognising that what occurs at each juncture is not necessarily detrimental to the normative conception of the separation of power a more nuanced formulation of its operation may emerge.

A point of query and one only tackled in passing here is whether it is possible to examine the separation of powers as a standalone norm in governance or does it require companionship to fully function. Waldron considers it possible to discuss the separation of powers in isolation to the rule of law and other norms usually associated with state-led constitutionalism but in practice it is clear that other norms must be present for it to function; '[i]t is one of a close-knit set of principles that work both separately and together as touchstones of institutional legitimacy'²⁴ While this enables research to centre on the separation of powers it does not resolve inadequacies in global governance structures. Thus, while the separation of powers is

²⁰ Waldron, 'Separation of Powers in Thought and Practice', p. 433.

²¹ F. Kirgis 'Custom on a sliding scale', *American Journal of International Law* 1987, vol. 86, p. 146.

²² O'Donoghue, *Constitutionalism in the Global Constitutionalisation Debate*, p. 202-205.

²³ R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom*, Cambridge: Cambridge University Press 2010, p. 214.

²⁴ Waldron, 'Separation of Powers in Thought and Practice', p. 438.

the focus this in no way ought to be interpreted as devaluing discussions on other normative claims on constituted authority.²⁵

From the outset there is an apparently difficulty for international law in how the separation of powers ought to be characterised. This obstacle lies in the fact that when we consider the separation of power we generally point to the executive, legislative and judicial function. These are keystones and while we may disassemble about what aspects need to be existent and in what form and even when mixed hierarchal/heterarchal debates on division of power these three functions of governance lie at its core. Despite the best efforts of some to locate these three within international law, their presence as understood from domestic sources, is, at best, ephemeral.²⁶ Yet Waldron's refocusing of these three elements into adjudication, law-making and its administration opens discussion to broader considerations which enables debate regarding global public law.²⁷ Such an approach facilitates the consideration of the indeterminacy of law and thus of the separation of powers as the fulcrum in which legal governance operates. Waldron takes to task the tautological tendency regarding the separation of powers and he is, to a certain extent, correct in his admonishments. Yet, of most utility is his taxonomy of the debate, particularly the characterisation of the differentiated character of the separation of power. Chiefly, his discussion of the integrity and dignity of the creation, administration and enforcement of law and law's relationship with politics is of much use in understanding how we ought to go about looking at the separation of powers beyond the state.²⁸

Thus, whether or not we identify three branches or whether some branches can be collapsed or how necessary judicial review or legislative control actually is; the question for global public law is whether there is integrity and dignity in the creation, adjudication and administration of law. That is whether there is division as well as checks and balances and if not, what does that leave for global public law and governmental authority beyond the state? Taking this approach to the separation of power assumes that its underlying normative value is such that we can gain insight by examining any governance order through its prism. A legitimate legal order, constitutional or otherwise, ought to ensure integrity and dignity in law and a system lacking these norms would be tyrannical. It is tyrannical in the sense that the creation, enforcement and administration of law would be reliant on the wisdom of a single or cohort of actors relying on their acumen as the source of good government. While this does not preclude the existence of law, it does break any connection to legitimacy.

Further, it is insufficient to explain the operation of separation of powers at the global level through the notion of abeyance. Abeyance suggests that any gaps in a governance regime are intended as it enables constituted power to fulfil its functions correctly by leaving space for debate and interpretation. Foley's argument that the gaps in constitutional governance can and often are intentional and important in managing conflict cannot currently be ~~used as an explanation engaged~~ beyond the state. Within global governance such an acute state of abeyance ought not to be regarded as legitimate, but rather the space in which a form of tyrannical governance can have full sway.²⁹ Nor can we rely on the internal legitimate governance of the state as ultimately international law does not enquire as to the constitutional or governance correctness of the operation of domestic law. Once an entity is recognised as a state it contributes to the creation of customary international law or votes in the Security Council but how the state decides on its interests are immaterial to global public law. State debts continue no matter the internal changes within a state, treaties continue to bind and customary international law remains intact. Whilst organisations may possess entry criteria, international

²⁵ O'Donoghue, *Constitutionalism in the Global Constitutionalisation Debate*, p. 155-197.

²⁶ For example Fassbender locates the executive, judiciary and legislature within the bounds of the UN and its Charter, Fassbender, 'The United Nations Charter as Constitution of The International Community' p. 529.

²⁷ Waldron, 'Separation of Powers in Thought and Practice', p. 456-459.

²⁸ Waldron, 'Separation of Powers in Thought and Practice', p. 445.

²⁹ M. Foley, *The Silence of Constitutions: 'Abeyances' and Political Temperament in the Maintenance of Government*, London: Routledge 1989.

law itself, beyond questioning the legitimacy of state's representativeness, remains aloof to domestic illegitimacy. As such, states cannot fill gaps in legitimate governance. Thus, if governmental authority is to have legitimacy and dignity in the creation, adjudication and administration of law beyond the state hard questions need to be asked about how we perceive the global order to operate.

To observe the consequences of the absence of the legitimate creation, adjudication and administration of the law as well as the potential for tyrannical power a taxonomy is utilised to generate an understanding of how we might understand separation of powers beyond the state. This approach illustrates the gaps where the dignity and integrity of law or rights are unprotected or deficient. Whilst this account focuses on constituted power and its operation as a core element of the operation of the separation of powers this does not forestall a discussion of what such an analysis of human rights within global governance may divulge. This chapter also foregoes a substantive application of this proposal to for example, customary international law, but again that would follow this analysis to demonstrate the pull between tyrannical and legitimate forces within global public law.

4. Global Public Law and the Separation of Powers

The sliding scale model of the separation of powers is a benchmark by which even the best governance system will, at times, be found wanting. But for the purposes of this chapter this definition aids in identifying yawning gaps within global governance if adjudged by a standard of legitimacy and dignity. It also suggests a ~~much~~ broader difficulty with the global governance system beyond ~~the~~ law into politics. Yet, the separation of powers on its own will not resolve ~~these~~ issues ~~relating to governance beyond the state but~~ rather this article suggests it forms part of the debate on how the global legal order ought to evolve over the coming years. The article will do so in two parts, first by considering differentiation and following this with a discussion of checks and balances as understood on a sliding scale. ~~But before this may come to fruition,~~ the separation of powers ~~itself~~ can be a tool of analysis that shines a light on the difficulties of establishing a legalised governance order beyond the state that would satisfy qualms regarding its legitimacy and dignity.

With the separation of powers operating on a sliding scale differentiation must, at least, be present and this would still require a system of checks and balances to compensate for the minimum form of differentiation. At a basic level this *de minimus* requirement appears to be all but absent within global governance. Möllers argues that the,

'[t]he political process ends with the democratic creation of law. This decision receives its legitimacy through the observance of constitutional rules. Vice-versa, constitutional law receives its legitimacy by opening itself to change through a democratic and political process. Legitimate law is, in a democracy, politically alterable law.'³⁰

We will return to the question of law formation later regarding customary international law, but the point remains that the link between the constituent actor's use of democracy to grant legitimacy to the constituted actor in the specific locale of law formation at the macro level forms an integral part of governance. Constituted power is granted for that specific purpose. Administration and adjudication come alongside and currently the processes by which we can identify both constituent and constituted power holders are rather shallow. Beyond the traditional form of recognition of actors within public international law, this process falls far short of attributing power to the current multitude of actors operating at both vertical and horizontal levels, including states, international, supranational and regional actors, NGOs, including corporations, individuals and diasporadic groups.

Thus, the first gap that a separation of powers analysis brings forth in global governance is the persistence in difficulties identifying both constituent and constituted actors. Separation of

³⁰ Möllers, *The Three Branches*, p. 79.

powers if understood as partially the division of constituted power will ~~naturally~~ concentrate on the latter but both must be identifiable. If the idea is to separate power, a first order proposition must be to identify who wields such power and following this to identify a process of checks and balances. Understanding the rationales for the separation of powers may make identifying who currently holds power beyond the state and also who ought to exercise authority easier. Nevertheless, alone separation of powers cannot remedy this gap as the first steps would be to identify constituent power holders which requires democratic legitimacy and a method of identifying who ought to exercise that warrant ~~that is beyond the remit of this article~~. In the interim, states and perhaps international organisations may stand in its stead, but without full theorisation of constituent and constituted power the gap in dignity and legitimacy in the creation, adjudication and administration of law remains.

4.1 Separation of Powers and Differentiation

The separation of powers is both a normative and organisational claim that, as discussed, results in variety of expectations of governance. The first is the divestment of power beyond a narrow set of actors. That is the Hobbesian differentiation of power as a minimum standard of governance.³¹ The diverse points of governance in the global order can become a strong basis in claiming a disbursement of power. Presently absent from global public law is recognition that this would require more than the 200 plus set of states traditionally recognised. Holding constituted power amongst a single set of actors whose consent is required for every element of governance, including individual rights, potentially works well in a horizontal based system where the states implement rights and are overseen by an inter-governmental system. Yet, the establishment of actors holding constituted power in particular instances such as the Security Council in the field of terrorism and the administration of transitional territories or the in binding adjudication of the ICC in the exercise of Security Council mandates suggests a level of differentiation may be emergent that global public law ought to tackle.³²

Of course the most obvious example of this would be the EU where the doctrine of subsidiarity and the operation of the governance order differentiates power. Arguably, at times, too much is made of the EU by international lawyers.³³ This is not to dispute the EU's place at the forefront of governance beyond the state but it is, as yet, a single example with no other regional body ~~coming near to~~ matching its sophistication. Thus, while it may be used as a point of differentiation and indeed of inspiration for future governance organisation it is one which is limited to providing a vertical and horizontal separation of powers for those European constituent power holders within its parameters as well as organisations such as the WTO where the EU acts as a juridical body.

Global administrative law points toward a trend within global public law which may be instructive in understanding alternate mode of differentiation in administration.³⁴ Möllers also points to the independent administrative agencies that are becoming an ever greater fixture of global governance and argues that while they do not fit in the classical model they may point to some differentiation.³⁵ Möllers uses the United Nations International Panel on Climate Change (UNIPCC) as an example, but equally the Internet Corporation for Assigned Names and Numbers (ICANN) or the World Meteorological Organisation (WMO) could easily stand in as an example of

³¹ Hobbes, *Leviathan*, p. 127–28, 184.

³² Chesterman, *You, the People*; C. Stahn (ed.), *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge: Cambridge University Press, 2008; J. Klabbers, 'Kadi justice at the Security Council', *International Organisations Law Review* 2007, vol. 4, no. 1, p. 293–304; D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Journal of International Criminal Justice* 2009, vol. 7, no. 2, p. 333–352.

³³ E. Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society', *Michigan Journal of International Law* 1998, vol. 20, no. 1, p. 1–30.

³⁴ N. Krisch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', *European Journal of International Law*, 2006, vol. 17, no. 1, p. 1–13.

³⁵ Möllers, *The Three Branches*, p. 122–123.

the expert agency with political sway. These bodies are another example of an area that traditional public international law cannot ~~give account for their operation~~.³⁶ While certainly they have a place in this governance debate, a critical one in fact, they perhaps do not suggest a fourth branch as Möllers proposes or a form that cannot be reconciled with legitimate governance but typifies the rather erratic form of governance developing in the global sphere. The UNIPCC, as a group of independent experts, follows a long tradition within international law of technocratic organisations.³⁷ Probably the best of examples of the authority these apparently technocratic organisations possess come in the form of the World Bank Group and the IMF. Both are economic organisations staffed by experts (economists in the main) making ~~informed~~ decisions that possess far reaching political ramifications.³⁸ While both organisations have an inter-state governance structure that overseas their decisions in many ways their authority is more attributable to their Managing Director and staff.³⁹

These bodies operate in a manner reminiscent of domestic ministries in specialisation and expertise in administration but they are also form part of the creation and adjudication of law. It is questionable whether there is sufficient division to meet the test set by the separation of powers sliding scale and certainly there are serious questions as to checks and balances. Yet, at the very least they ~~do~~ offer an alternate source of administrative power through their expertise which may provide the rudimentary structure required to eventually regard them as part of a separation of powers model. Yet, questions surrounding technocracy also arise from relying on these bodies.⁴⁰ The apparatus of administration is large beyond the state and while the intricacies of tax, even for the EU, remains beyond the limits of global governance administration, it is becoming ever more encompassing. Ultimately, this differentiation within global governance is entirely on an ad hoc basis. Whilst it is present in some instances it is rarely recognised as necessary for the legitimate exercise of constituted power. Thus, a second gap emerges where administrative functions are increasingly held at regional and global levels of expertise, but without an approach to governmental authority that recognises their operation as part of the function of global public law and more critically with the need to differentiate their actual operation in the creation, administration and adjudication of law.

4.2 Separation of Powers and Checks and Balances

Regarding checks and balances a question for global public law is who possesses a role in checking both the legitimacy and legalism of the use of power and whether this is recognised by the diverse points of governance within the global order as part of their rationale for existence. Consequently not only who is capable of providing a basis of checks and balances, but also whether their role is recognised by the other actors involved in the governance process. There is an innate tension in maintaining a system of checking legitimacy and legalism when the actors that ought to engage in the practice possess ~~es~~ a questionable status to do so. Thus, such a system of balance would fail to fulfil its normative function in practice even if in theory it ought to occur. ~~This Further, the~~ gap in possessing the ability to check and its actual operation ~~also~~ impacts upon the integrity of law formation. Law creation is conventionally seen as a legislative process

³⁶ S. Cassese 'Administrative Law without the State? The Challenge of Global Regulation', *New York University Journal of International Law and Politics* 2005, vol. 37, no. 4, p. 663-695, at 668-670.

³⁷ The Central Commission for Navigation on the Rhine 1831 is often cited as the first international organisation

³⁸ Joseph Stiglitz, 'What I learned at the world economic crisis' (2000), in: W. Driscoll & J. Clark, (ed.) *Globalization and the Poor: Exploitation or Equalizer?*, New York: International Debate Education Association, p. 195-204.

³⁹ M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, Oxford: Hart Publishing 2003.

⁴⁰ D. Kennedy, 'The Disciplines of International Law and Policy', *Leiden Journal of International Law* 1999, vol. 12, no. 1, p. 120; R. Howse, 'From Politics to Technocracy - and Back Again: The Fate of the Multi-lateral Trading Regime', *American Journal of International Law* 2002, vol. 96, p. 94-107, at 101.

and at the global governance level traditionally reserved to the inter-state paradigm. Yet, if we look at customary international law, the role of the judiciary in developing law, private bodies such as the American Law Institute or simply the messy character of international law's creation illustrates ~~potentially~~ how checks may be operational but also its minimal invocation in practice.⁴¹

The abundance of adjudicatory mechanisms and their variety at the global governance level may be an obvious place to locate a checking and balancing function. The mere presence of such profusion suggests that the division of power at the adjudicatory point regarding the micro level (normally individual) is at least sound. Yet, for example, the limited and rather grudgingly agreed process of appeal regarding Security Council terror lists suggests otherwise.⁴² If domestic courts do not review treaties as they are regarded as part of the executive function it suggests that this is left to international courts ~~to carry out~~. Presently it seems that beyond *jus cogens* treaties are entirely outside of international court's remit.⁴³ An example of one possibility is the International Court of Justice potential to review the actions taken by other UN organs thus checking their operation in the creation and administration of law. Whilst the Lockerbie case came close to answering whether this was a possibility the question remains unresolved.⁴⁴ A further example may be the EU Court of Justice. As Möllers correctly observes the EU does not have 'force' but it relies entirely on 'external national enforcement mechanisms' which works within the confines of the EU but it is difficult to identify any replication at present beyond the state or the development of state practice to a point which may be considered customary international law.⁴⁵ Indeed, with the possible exception of the International Criminal Court and the Security Council, there is a lack of compulsory jurisdiction outside of the EU.

The creation of the IMF Independent Evaluation Office or the World Bank Inspection Panel may establish a point of check on administrative action but what remains lacking is review of the legislative and adjudicative processes undertaken within global economic public law.⁴⁶ Beyond the macro level of general inter-governmental oversight which does match the power that these two institutions actually have within the countries that they grant conditional loans to, there is sparse concern for checks and balances. The problematic nature of this lack of examination has been identified with the establishment of both Review Panels as well as attempts to inculcate economic and social rights into their operation but these are meagre successes.⁴⁷ The existing systems of complaint and review are welcome additions, but they merely scratch the surface of a much broader range of global activities ~~where these organisations are involved~~. There are levels of political accountability also at the UNIPCC and

⁴¹ D. M. Trubek & L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', *European Law Journal* 2005, vol. 11, no. 3, p. 343-364; H. Lauterpacht, *The Development of International Law by the International Court*, Cambridge: Cambridge University Press 1982; J. Crawford, 'International Law and the Rule of Law' 3 *Adel. L. Rev.* 24, American Law Institute, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=33

⁴² Bardo Fassbender, Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter (2006, Commissioned by the United Nations Office of Legal Affairs) http://www.un.org/law/counsel/Fassbender_study.pdf

⁴³ Article 53, Vienna Convention of the Law of Treaties 1969 1155 UNTS 331

⁴⁴ ICJ 29 June 1999, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya V. United Kingdom)* Reports 97.

⁴⁵ Möllers, *The Three Branches*, p. 81

⁴⁶ Independent Evaluation Office of the IMF, <http://www.imo-imf.org/imo/pages/IEOHome.aspx>, Inspection Panel of the World Bank Group, <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx>

⁴⁷ I. F. Shihata, *The World Bank Inspection Panel: In Practice*, Oxford: Oxford University Press 2000; M. R. Abouharb & D. Cingranelli, *Human Rights and Structural Adjustment*, Cambridge: Cambridge University Press 2007.

other UN bodies, but they have been subject to much critique as largely rudimentary or as having minimal impact.⁴⁸

If mere division is present it requires a robust form of checks and balances or vice versa if checks and balance is firmly established, mere division may suffice. Presently, it would appear ridiculous to make a separation of powers claim for global governance or global public law, though of course this is not to suggest some elements may be nascent but merely that ~~to jump to~~ claim too soon may have a negative impact on how we ought to tackle these issues and the gaps which a separation of powers analysis brings forth. The mere existence of courts and other adjudicative bodies may satisfy the need for division in that there is an acceptance that in instances of micro legal application they are required but this does not necessarily imply that it enables a fully operational system of checks and balances.⁴⁹

5. Concluding remarks

This article identifies a number of gaps in governance beyond the state. The first is the difficulties associated with identifying the holders of constituted power and coupled with this, constituent power. The second, a gap exists in the differentiation between the formation, administration and adjudication of law and third the identification of a system of checks and balances. This chapter suggests that at present, these gaps firmly establish a lack of separation of powers beyond the state. In turn, this infers that if asked whether there is dignity and legitimacy within global public law the answer may be a qualified negative. On this basis it could be argued that what this chapter demonstrates is entirely negative and brings governance beyond the state into ill repute. Yet, it also may give an impetus to considering the gaps in function and legitimacy within global public law and may also furnish potential solutions.

Waldron asks us to dry our eyes about the potential passing of the necessity of separation of powers and perhaps Loughlin, Posner and Vermeule are correct in the domestic sphere but at the global level, as just described, it remains a necessity.⁵⁰ As Waldron argues in some ways the content does not matter so much, but rather what we can do with separation of powers to improve the legitimacy and dignity of global public law. Insisting that the separation of powers is already present within the global public system merely creates an imaginary order that fails to proffer any legitimacy or dignity in practice.

It could be asked whether any of this is necessary and whether the separation of power is an ideal that is aspired to or indispensable to global governance. And so it may be. But if such is the case than such a position ought to be widely endorsed and any pretension toward either a liberal or democratic governance order, constitutional or not, abandoned. Those that remain steadfast to the state-only forms of international law where all legitimacy come from a horizontal consent based system already accept that establishing liberal or democratic governance is unnecessary. This is not suggesting that these scholars are in favour of tyrannical authority, but rather they accept that liberal or democratic governance is an unnecessary qualm for global public law. States should also make this assertion clear. This is not what this author would advocate ~~as a suitable way forward~~, but it does have the virtue of being an honest account of the present operation of law. If on the other hand liberal governance is identified as at least desirable then discussions on how to incorporate differentiation alongside checks and balances becomes an imperative.

⁴⁸ In the present state of integration, it is therefore not required to democratically develop the system of the European institutions in analogy to that of a state...Because and in so far as the

⁴⁸ S. Chesterman, 'An International Rule of Law?', *American Journal of Comparative Law* 2008, vol. 56, no. 2, p. 331-361.

⁴⁹ Möllers, *The Three Branches*, p. 104.

⁵⁰ Waldron, 'Separation of Powers in Thought and Practice', p. 433-434; E.A. Posner & A. Vermeule, *The Executive Unbound: After the Madisonian Republic*, Oxford: Oxford University Press 2010, p. 120; M. Loughlin, *The Idea of Public Law*, Oxford: Oxford University Press 2003, p. 32.

European Union itself only exercises derived public authority, it need not fully comply with the requirements.⁵¹

The German Constitutional Court statement suggests it is accepted that democracy is unnecessary where constituted power remains minimal, but this also intimates that there is a tipping point beyond which derived public authority no longer suffices for the legitimate exercise of power. This returns us to the question of constituted and constituent power and the possibility that what currently operates within international law is a form of tyrannical power. Separation of powers on a sliding scale enables a flexible approach to be taken, but requires a *de minimus* position to be steadfast. Global public law will need to take up the challenge of moving from tyrannical power to constituted power bound by differentiation as well as checks and balances. The incidences within global public law where the rudimentary elements may be found are instructive but the political and legal question is whether we wish to take this further or are we content with tyranny beyond the state.

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⁵¹ Treaty of Lisbon, BVerfG, 2 BvE 2/08 vom 30.6.2009, para 278 & 271